The modern English doctrine of unconscionability

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Abstract

This paper argues that the uncertainty that once plagued the English doctrine of unconscionability has given way to certainty and predictability, as the criteria for relief formulated in Alec Lobb Garages Ltd v Total Oil (Great Britain) Ltd *has prevailed over the competing criteria identified in* Fry v Lane *as restated in* Cresswell v Potter. *It further argues that the* Alec Lobb *test has had the effect of restricting the protective reach of the modern English doctrine of unconscionability to such an extent that it is unable to provide effective protection to weaker parties. Whilst weaker parties now enjoy significant protection under various statutory regimes, it is argued that unconscionability still serves an important function and it should be developed to enable it to discharge that office more effectively. The paper suggests possible directions in the future development of the English doctrine. In doing so, it argues that, unlike the approach emerging in some jurisdictions, English law should retain unfairness in the terms of the transaction as a requirement for relief.*

Introduction

The jurisdiction of equity to provide relief against unconscionable bargains 'is long established and well known.'[1] Yet complaints persist about uncertainty in relation to the criteria for relief on this ground.[2] Thus unconscionable bargains or unconscionability has been described as 'an extremely uncertain doctrine.'[3] In England, the uncertainty is attributable to inconsistency in the judicial statements of the unconscionability criteria,

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[1] *Pitt v Holt* [2011] 2 All ER 450; [2011] EWCA Civ 197 at [165].

[2] Eg in Canada unconscionability has been described as 'elusive, questionable, uncertain, and potentially meaningless': see GHL Fridman, *The Law of Contract in Canada,*Carswell, Toronto, 2011, p 330; in the USA, E Brown, 'The Uncertainty of U.C.C. Section 2-302: Why Unconscionability has become a Relic' (2000) 105 *Commercial Law Journal* 287 and CL Knapp, 'Unconscionability in American Contract Law: A Twenty-First Century Survey' in LA DiMatteo *et al*, eds, *Commercial Contract Law: Transatlantic Perspectives*, Cambridge University Press, New York, 2013, 309, pp 322-4.

[3] Law Com No 332 *Consumer Redress for Misleading and Aggressive Practices (2012),* para 3.66.

culminating in two main divergent tests: the *Cresswell v Potter*[4] criteria based on *Fry v Lane*,[5] and the criteria in *Alec Lobb Garages Ltd v Total Oil (Great Britain) Ltd.*[6] There was confusion as some judges adopted the former,[7] while others followed the latter.[8] Among commentators, there is also a division of opinion. Some adopt the three *Alec Lobb* criteria[9] while others state that four elements are required for relief on this ground[10] and that the four elements are, in effect, a combination of the *Cresswell* and *Alec Lobb* requirements. Another view is that there are four elements to the doctrine, but only two are prerequisites for relief. [11]

This paper argues, in Part II, that although for some time there was confusion as to the criteria for relief under English law, there is now a consensus in the modern English authorities in favour of the *Alec Lobb* criteria and that this consensus has resulted in certainty and predictability. It further advances the view, in Part III, that whilst the *Alec Lobb* consensus has introduced a much welcome certainty into this corner of the law, it has significantly restricted the protective reach of unconscionability, thereby leaving a deficit in the protection of weaker contracting parties. Although this protection deficit has to some extent been covered by statutory regulation of unfairness in contracts, it is argued in Part IV that unconscionability still serves an important role in the protection of persons contracting under circumstances of special disadvantage and that its scope should be extended to enable it to discharge this function effectively. Part V offers some suggestions on possible directions in the future development of the English doctrine of unconscionability. In doing so, it argues,

[4] [1978] 1 WLR 255 (hereafter *Cresswell)*.
[5] (1889) 40 Ch D 312.
[6] [1983] 1 WLR 87 (hereafter *Alec Lobb*).
[7] Eg *Backhouse v Backhouse* [1978] 1 WLR 243 at 250-1; *Butlin-Sanders v Butlin* [1985] Fam Law 126; *Bahbra v United Bank* [1991] NPC 79.
[8] See the cases mentioned below, n 27-31.
[9] Eg J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract,* Oxford University Press, New York, 2016, p 401; D Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 *LQR* 479 at 481.
[10] N Bamford, 'Unconscionability as a Vitiating Factor' [1995] *LMCLQ* 538 at 559; N Andrews, *Contract Law*, Cambridge University Press, Cambridge, 2015, p 312; Chen-Wishart, *Contract Law,* Oxford University Press, New York, 2015, p 363.
[11] G Spark, *Vitiation of Contracts: International Contractual Principles and English Law*, Cambridge University Press, New York, 2013, pp 279-80.

inter alia, that unconscionability should continue to be concerned with both procedural and substantive unfairness and that, contrary to the view emerging in some jurisdictions, unfairness in the terms of the transaction should not be discarded as a criterion for relief. The conclusions are stated in Part VI.

The Consensus on the *Alec Lobb* Criteria

The jurisdiction to set aside a contract on the ground of unconscionability is not an unfettered or unlimited one. The court will intervene only where specific criteria or 'hallmarks of unconscionability' [12] are satisfied. However, for many years there have been doubt and uncertainty as to the applicable criteria. One writer has observed that '[t]here is no seminal judicial pronouncement in England of the unconscionable bargain criteria'.[13] There is indeed no authoritative guidance from the UK Supreme Court on this issue. However, in the lower courts there have been numerous, albeit inconsistent, judicial pronouncements on the point. From the thicket of judicial statements, two different tests gained prominence. On the one hand, there is the statement of three criteria identified in *Cresswell* and, on the other hand, there is the different list of three criteria formulated in *Alec Lobb.* As a result, there was uncertainty and confusion on this issue. However, it is submitted that English law is no longer plagued by uncertainty on this point, as there is now a judicial consensus on the *Alec Lobb* test, which has allowed the *Cresswell* test gradually to wither away. It may be helpful first to identify the key differences between the two tests.

Differences between the *Cresswell* and *Alec Lobb* Tests

[12] *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 at 229.
[13] D Capper, 'The Unconscionable Bargain in the Common Law World' (2010) *LQR* 403 at 417.

In both *Cresswell* and *Alec Lobb* three elements were listed as the requirements for relief on the ground of unconscionability. However, the elements in the two cases are not identical. In *Cresswell,* the three criteria identified by Megarry J are that:

(i) the complainant was 'poor and ignorant';

(ii) the transaction was at 'a considerable undervalue'; and

(iii) the complainant did not receive independent advice. [14]

Whereas the three criteria articulated in *Alec Lobb* are that:

(a) the complainant was 'at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that the circumstances existed of which unfair advantage could be taken';

(b) this weakness of the complainant was 'exploited by the other [party] in some morally culpable manner'; and

(c) 'the resulting transaction must have been, not merely hard or improvident, but overreaching and oppressive.'[15]

To be sure, there are some similarities between the two tests. For example, the first *Cresswell* criterion and the first *Alec Lobb* requirement are both concerned with inequality between the parties in that one party is in circumstances of which unfair advantage could be taken and the second *Cresswell* requirement is similar to the third *Alec Lobb* requirement in that both are concerned with imbalance in the terms of the transaction to the disadvantage of the weaker party.

However, there are important differences between the two tests. First, the *Cresswell* requirement of 'poor and ignorant' person is narrower than its *Alec Lobb* counterpart of a person at a 'serious disadvantage'. Even though in *Creswell* the court modernised and expanded the concept of a 'poor' and 'ignorant' person so that the former is not limited to

[14] [1978] 1 WLR 255 at 257.
[15] [1983] 1 WLR 87 at 94-5.

one who is destitute, but refers to 'a person of the lower income group' and the latter means a 'less highly educated' person,[16] the *Alec Lobb* formulation is much wider. It includes all those who fall within the *Cresswell* category, but in addition extends to anyone who is at a serious disadvantage through lack of advice 'or otherwise'.

Secondly, the third requirement in *Cresswell* (lack of independent advice) is not included in the *Alec Lobb* criteria.

Thirdly, the *Alec Lobb* threshold for transactional imbalance ('not merely hard or improvident, but overreaching and oppressive') is significantly higher than the *Cresswell* threshold ('considerable undervalue'), as discussed below.[17]

Fourthly, and this is the most important difference between the two tests, the *Alec Lobb* criteria includes the requirement that the stronger party must have exploited the weakness of the other party in a morally culpable manner. In *Cresswell* itself, the transaction was set aside because the three *Cresswell* requirements were satisfied, even though there was no specific finding that the stronger party acted in a morally culpable manner. However, in *Alec Lobb* relief was refused specifically because there was no finding that the stronger party exploited the position of the weaker party in a morally culpable manner.

The Triumph of *Alec Lobb*

Whilst for several years the *Cresswell* and *Alec Lobb* tests vied with each other for supremacy and this resulted in inconsistency and uncertainty, in this century the *Alec Lobb* test has become generally accepted by the courts whilst the *Cresswell* test has gradually faded away. Thus, the Court of Appeal has stated that lack of independent advice, the *Cresswell* criterion that has no counterpart in the *Alec Lobb* test, is not a requirement for relief,[18]

[16] [1978] 1 WLR 255 at 257.
[17] See section entitled 'Transactional imbalance: must it be overreaching and oppressive?'
[18] Eg *Alec Lobb* [1985] 1 WLR 173 at 182; *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 at 234.

although it may be relevant in determining whether the weaker party was under a special disability or whether the conduct of the stronger party was unconscionable.[19]

By contrast, each of the *Alec Lobb* criteria has been adopted in the modern authorities. Take the criterion that has no counterpart in the *Cresswell* criteria, namely the requirement that the stronger party exploited the special disability of the weaker party in a morally culpable manner (unconscionable conduct of the stronger party). Some commentators have opined that this is not a requirement for relief, in that 'the conduct of the [stronger party] is largely irrelevant.'[20] Another writer has stated that, although 'not clearly resolved', this element 'is probably also a requirement'.[21] However, it is suggested that it is now settled that this element is a requirement. First, this element has been a requirement for relief since at least the eighteenth century.[22] It is such conduct that Lord Hardwicke described in *Earl of Chesterfield v Janssen*[23] as constructive fraud. And it is the same kind of fraud, which, a century later, Lord Selborne L. C. explained in *Earl of Aylesford v Morris*[24] as an unconscientious use of the power arising out of the relative position of the parties. By the close of the 19th century, the House of Lords had confirmed this requirement and refused relief in cases where it was not satisfied.[25]

Secondly, more recently, this requirement was applied by the Court of Appeal in the *Alec Lobb* case itself[26] and in subsequent decisions.[27] It has also been applied in the vast majority of English decisions in the last 20 years.[28]

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[19] N Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, Sweet & Maxwell, London, 2012, paras 19-004 to 19-006.
[20] J Devenney and A Chandler, "Unconscionability and the taxonomy of undue influence" [2007] *JBL* 541 at 551.
[21] A Burrows, *The Law of Restitution*, Oxford University Press, New York, 2011, p 300.
[22] Eg *Proof v Hines* (1735) Cases T Talbot 111 at 115 25 ER 690 at 691-2; *Heathcote v Paignon* (1787) 2 Bros CC 167; 29 ER 96.
[23] (1751) 2 Ves Sen 125 at 155; 28 ER 82 at 100.
[24] (1873) LR 8 Ch App 484 at 491.
[25] Eg *O'Rorke v Bolingbroke* (1877) 2 App Cas 814; *Harrison v Guest* (1860) 8 HLC 481, esp 491; 11 ER 517 esp 521.
[26] [1985] 1 WLR 173 at 182-3, 188-9.

Concerning the element of the relative position or circumstances of the parties, it is the *Alec Lobb* formulation of serious disability that has been widely accepted in the modern English cases.[29] The courts have not limited themselves to the narrower *Cresswell* requirement of 'poor' and 'ignorant' person.

And in relation to the element of transactional imbalance, the courts now prefer the more stringent *Alec Lobb* test that the transaction must have been, 'not merely hard or improvident, but overreaching and oppressive'[30] to the *Cresswell* formulation of 'considerable undervalue'.

On the whole, although the UK Supreme Court has not yet had the opportunity to issue authoritative guidance on the unconscionability criteria, on the current state of the authorities, the *Alec Lobb* criteria have prevailed[31] and the *Cresswell* criteria have effectively been consigned to the ossuary. The result is that the uncertainty and confusion of the past has been replaced by certainty and predictability as to the applicable criteria.

For the sake of completeness, it should be noted that other tests of unconscionability have been suggested at various times. However, these have not taken root in English law. For example, in *Strydom v Vendside Ltd*,[32] the learned judge expressed the view that the three requirements for relief are the *Alec Lobb* elements, but he added that after these requirements have been established the burden shifts to the stronger party to show that the transaction was

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[27] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at 152-153; *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 at 229, 234; *Jones v Morgan* [2001] Lloyd's Rep Bank 323 at [35]; [2001] EWCA Civ 995 at [35].

[28] Eg *Deakin v Faulding* [2001] All ER (D) 463 at [86]; *Singla v Bashir* [2002] EWHC 883 (Ch) at [28]; *Humphreys v Humphreys* [2004] EWHC 2201 (Ch) at [106]; *Ruddick v Ormston* [2005] EWHC 2547 (Ch) at [32]; *Fineland Investment Ltd v Pritchard* [2011] 6 EG 102 (CS); [2011] EWHC 113 (Ch) at [77]; *Liddle v Cree* [2011] EWHC 3294 (Ch) at [92]; *Evans v Lloyd* [2013] EWHC 1725 (Ch) at [76]; *Godden v Godden* [2015] EWHC 2633 (Ch) at [92]-[95].

[29] Eg *Greenwood Forest Products (UK) Ltd v Roberts* ([2010] Bus L R D146 at [278]; *Jones v Morgan* [2001] Lloyd's Rep Bank 323; [2001] EWCA Civ 995 at [39].

[30] Eg *Jones v Morgan* [2001] Lloyd's Rep Bank 323; [2001] EWCA Civ 995 at [39]; *Strydom v. Vendside Ltd* [2009] 6 Costs LR 886; [2009] EWHC 2130 (QB) at [39]; *Greenwood Forest Products (UK) Ltd v Roberts* ([2010] Bus L R D146 at [279]; *Godden v Godden* [2015] EWHC 2633 (Ch) at [94];

[31] See *eg Evans v Lloyd* [2013] EWHC 1725 (Ch) at [47]; *Greenwood Forest Products (UK) Ltd v Roberts* ([2010] Bus L R D146 at [269]-[272]; *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) at [558].

[32] *Strydom v Vendside Ltd* [2009] 6 Costs LR 886; [2009] EWHC 2130 (QB) at [36].

fair, just and reasonable. A similar approach is adopted in *Chitty on Contracts*.[33] Under this approach, even after a claimant has established all the three *Alec Lobb* requirements he may nevertheless be refused relief if the stronger party can somehow show that the transaction was fair, just and reasonable. This view is, with respect, difficult to support. First, it is not well founded in authority. In *Strydom v Vendside,* no case was cited in support of the proposition. The court referred to a passage in *Snell's Equity*[34] which relied on the well-known statement of Lord Selborne L.C. in *Earl of Aylesford v Morris,*[35] quoted below. However, Lord Selborne's statement is concerned with cases where the unconscionable conduct of the stronger party (the second *Alec Lobb* criterion) has not been established by evidence, but rather has been presumed. It is in such a case that the burden of proof shifts to the stronger party to *rebut the presumption*, by showing that the transaction was fair, just and reasonable. Lord Selborne was talking specifically of those cases in which a presumption of constructive fraud is raised.[36] He explained that:

> 'Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and the conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it have been in point of fact fair, just and reasonable.'[37]

This statement does not afford support for the view that after all the three *Alec Lobb* criteria have been established by evidence, the burden of proof shifts to the stronger party to show that the transaction was fair, just and reasonable.

Secondly, quite apart from authority, the *Strydom* view is questionable in principle. Where the court is satisfied on the evidence that the three *Alec Lobb* requirements are satisfied, it is

[33] H Beale, ed, *Chitty on Contracts* (Sweet and Maxwell, London, 2015), vol 1, paras 8-133 and 8-139.
[34] J McGhee, ed, *Snell's Equity,* Sweet & Maxwell, London, 2005, para 8-47. The passage does not appear in the current 33rd edition, para 8-042.
[35] (1873) 8 Ch App 484 at 490.
[36] At 490.
[37] At 490-91.

hard to see how it can be possible for the stronger party to show, on the same facts, that the transaction was fair, just and reasonable. Moreover, since the unconscionable conduct of the stronger party is one of the *Alec Lobb* criteria which, under the *Strydom* approach, is to be established before the evidential presumption, which shifts the burden of proof, is raised and since it is a presumption of wrongdoing[38] or unconscionable conduct, it is completely pointless to raise a presumption which presumes that which has already been established by evidence.

Another test of unconscionability that has been advanced is one that has four elements. These are, in essence, the three *Cresswell* criteria plus the *Alec Lobb* criterion of unconscionable conduct of the stronger party. This seems to be the approach of the Privy Council in *Hart v O'Connor*.[39] It is similar to the approach adopted more recently by courts in some Canadian provinces.[40] However, that approach has not been followed by the courts in England, where the *Alec Lobb* approach has taken root. But the *Alec Lobb* test is not without concerns.

The Problem with the *Alec Lobb* Test

Whilst the consensus on *Alec Lobb* has brought the benefit of certainty, it has come with a problem of its own, in that it has raised the threshold for relief to such a high level that it is now virtually impossible for weaker parties to secure protection on the ground of unconscionability. As a result, claims based on unconscionability have failed in the vast majority of cases in recent times.[41] In effect, the *Alec Lobb* approach has turned the English

[38] *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221.
[39] [1985] AC 1000.
[40] In Alberta (*Cain v Clarica Life Insurance Co*, (2005) 263 DLR (4th) 368; 2005 ABCA 437; *Benfield Corporate Risk Canada Ltd v Beaufort International Insurance Inc* [2014] 1 WWR 772 at [125]; 2013 ABCA 200, at [125] and in Ontario (*Titus v William F Cooke Enterprises Inc* (2007) 284 DLR (4th) 734 at [38]-[39]; 2007 ONCA 573 (CanLII) at [38]-[39]).
[41] Eg *Godden v Godden* [2015] EWHC 2633 (Ch); *Minder Music Ltd v Sharples* [2016] FSR 2; [2015] EWHC 1454 (IPEC); *Evans v Lloyd* [2013] 2 P & CR DG21; [2013] EWHC 1725 (Ch); *Sandher v Pearson* [2013] EWCA Civ 1822;

doctrine of unconscionability into something of a toothless bulldog. It has been suggested that the current English doctrine of unconscionability 'is too uncertain to deliver effective consumer protection.'[42] However, it is submitted that the inability of the modern English doctrine to provide effective protection is due more to the restrictive nature of the *Alec Lobb* criteria than to uncertainty. To appreciate the extent to which *Alec Lobb* has debilitated unconscionability under English law it is helpful to examine each of the three *Alec Lobb* criteria or gateways to relief. A comparison with the older cases of the 18th and 19th centuries will show that while the threshold for the first *Alec Lobb* criterion is similar to that in the older cases, the thresholds for the remaining two have been raised significantly, making it extremely difficult for claimants to satisfy the requirements for relief.

Special disability

Alec Lobb takes a balanced approach to the requirement of serious or special disability. On the one hand, it is not confined to the poor or ignorant person of *Cresswell*. It covers any serious disability that creates circumstances of which unfair advantage could be taken. This is in line with the older cases, which recognised a wide range of circumstances capable of constituting special disability, including very old age, illness, intoxication, weakness of mind, and necessity.[43] The modern cases have also recognised that special disability covers a variety of circumstances including old age and senile dementia,[44] being under pressure due to the imminent collapse of a person's business to which he was emotionally attached[45] and

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Fineland Investment Ltd v Pritchard [2011] EWHC 113 (Ch); *Liddle v Cree* [2011] EWHC 3294 (Ch); *Strydom v Vendside Ltd* [2009] 6 Costs LR 886; [2009] EWHC 2130 (QB); *Hughes v Hughes* [2005] 1 FCR 679; [2005] EWHC 469 (Ch); *Ruddick v Ormston* [2005] EWHC 2547 (Ch); *Humphreys v Humphreys* [2004] EWHC 2201 (Ch); *McCreanney v McCreanney* [2003] All ER (D) 161; *Singlar v Bashir* [2002] EWHC 883 (Ch); *Jones v Morgan* [2001] EWCA Civ 995; *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221.

[42] Law Com No 332, para 3.51.

[43] See Enonchong, above, n 19, pp 413-433.

[44] *Ayres v Hazelgrove*, Queens Bench, Russell J, 9 February 1984.

[45] Eg *Greenwood Forest Products (UK) Ltd v Roberts*, QB, 12 March 2010 at [238]-[239] and [278].

generally lack of assistance where assistance and advice was required.[46] On the other hand, this gateway to relief is not without restrictions. First, in commercial transactions between large entities the court is unlikely to accept that one party was at a serious disadvantage.[47] Secondly, even in a transaction with a person who was poor, illiterate or ignorant, if the person received independent advice before entering into the transaction, the courts may not accept that the person was under a special disability.[48]

Unconscionable Conduct of the Stronger Party: when Undue Influence is not Unconscionable Conduct

This requirement is satisfied where the conduct amounts to constructive fraud.[49] However, constructive fraud covers a wide variety of conduct regarded by equity as morally culpable, but not necessarily involving actual dishonesty.[50] In the older cases, the threshold was so low that the requirement was satisfied where the transaction was concluded in haste in circumstances where the weaker party did not receive independent advice,[51] even if the stronger party advised the weaker party to seek independent advice but he declined.[52] The requirement was also satisfied even in cases where there was no personal misconduct on the part of the stronger party, but there was imprudence or incompetence on the part of the solicitor employed to act for both parties.[53] In short, the absence of active steps by the stronger party to exploit the special disability of the weaker party did not make the conduct of the stronger party morally blameless.

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[46] *Ruddick v Ormston* [2005] EWHC 2547 (Ch).
[47] Eg *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch).
[48] Eg *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221; *Jones v Morgan* [2001] EWCA Civ 995 at [40].
[49] *Chesterfield v Janssen* (1751) 2 Ves Sen 125 at 155; 28 ER 82 at 100; *Aylesford v Morris* (1873) LR 8 Ch App 484 at 491; *Hart v O'Connor* [1985] AC 1000 at 1024.
[50] *Mander v Evans* [2001] 1 WLR 2378, 2385.
[51] Eg *Attorney General v Vernon* (1685) 1 Vern 370 at 387; 23 ER 528 at 535; *Herne v Meeres* (1687) 1 Vern 465, 466; 23 ER 591 at 591.
[52] *Evans v Llewellin* (1787) 1 Cox Eq Cas 333; 29 ER 1191.
[53] *Clark v Malpas* (1862) 4 DF & J 401; 45 ER 1238; *Fry v Lane* (1889) 40 Ch D 312.

However, in the modern cases, following the *Alec Lobb* test, the threshold for unconscionable conduct of the stronger party has been raised. The modern approach can be illustrated by the decision in *Ruddick v Ormston,*[54] which provides an instructive contrast with the approach in the older cases, exemplified by *Evans v Llewellin.*[55] In *Evans*, two brothers, who were poor, conveyed an estate to the defendant, who was affluent, for a consideration that was inadequate. They did so without taking time to consider the matter and without independent advice. There was no pressure exerted by the stronger party on the poor men and no material fact was concealed from them. In fact, the solicitor of the stronger party cautioned them to take time to consider the matter and to seek advice, but they declined. Nevertheless, it was held that the conduct of the stronger party was unconscionable and relief was granted. The court stressed that the stronger party should have insisted on the weaker parties taking time to consider the matter and to take advice. However, it was acknowledged that the conduct of the stronger party did not involve a high degree of moral culpability and there was a specific finding that there was no actual fraud by the stronger party. Thus, referring to the conduct of the stronger party, Sir Lloyd Kenyon, MR, stated that 'I will not use any harsh terms, because in truth I do not think that the case calls for it. I will give no costs for the same reason'.[56]

In *Ruddick v Ormston*[57] the claimant, who had many years of experience in the building trade, put an unsolicited leaflet through the door of the defendant, asking to be contacted if the defendant was considering selling his flat. The leaflet promised free valuation and no legal fees to pay. The defendant contacted the claimant and told him he was interested in selling his flat. The defendant was asked to name a price and he put forward £25,000, in ignorance of the true value of the property (which was about £55,000). The claimant accepted

[54] [2005] EWHC 2547 (Ch).
[55] (1787) 1 Cox Eq Cas 333; 29 ER 1191.
[56] (1787) 1 Cox Eq Cas 333 at 341; 29 ER 1191 at 1194.
[57] [2005] EWHC 2547 (Ch).

the price. That agreement was concluded at a meeting between the parties that lasted no more than 30 minutes. When the vendor later discovered the true value, he refused to complete the transaction and the purchaser claimed specific performance. It was held that the contract was unenforceable on a different ground. However, as the court had heard argument on a defence based on unconscionability, Patten J. went on to state his conclusions on it. He held that the purchaser's conduct was not unconscionable as there was no pressure from the purchaser and no false or misleading representations made to the vendor by the purchaser.

Yet the purchaser's conduct was not beyond reproach. The court found that he was aware that the price agreed was considerably below the market value of the property and that the vendor had not taken any proper advice. Moreover, the purchaser did not honour the promise in his leaflet to provide a free valuation. Therefore, the degree of moral culpability in the conduct of the purchaser in this case is higher than that of the stronger party in *Evans*. Not only did he allow the vendor to enter into the agreement without taking advice (as in *Evans*), but, in addition, he did not even advise the vendor to seek advice (unlike in *Evans*) and he failed to honour his own promise to provide a free valuation. Whereas the court in *Evans* expected the stronger party to have (actively) insisted on the weaker party taking time to consider the matter and to take advice, over two centuries later, the court in *Ruddick* was satisfied that the stronger party was passive in that '[t]here was no attempt by [the stronger party] to dissuade [the weaker party] from seeking advice.'[58]

Similarly, in the more recent case of *Evans v Lloyd*,[59] Evans, acting under a special disability, transferred all the property of substance that he owned to the defendants as a gift. The defendants knew of the special disability of Evans, but they did not advise him to seek independent advice before making the transfer. Yet it was held that the conduct of the defendants in accepting the gift in such circumstances was not unconscionable, as they had

[58] [2005] EWHC 2547 (Ch) at [33].
[59] *Evans v Lloyd* [2013] 2 P & CR DG21; [2013] EWHC 1725 (Ch).

not taken active steps to dissuade Evans from seeking independent advice before making the transfer.

Under the modern English cases, the threshold for establishing unconscionable conduct of the stronger party is so high that some judges consider that conduct which is sufficient to satisfy the requirement of unconscionable conduct for relief on the ground of undue influence[60] may not be enough to satisfy the *Alec Lobb* requirement. In *Humphreys v Humphreys,*[61] for example, the court found that the impugned transaction had been induced by undue influence, but an alternative claim based on unconscionability failed because, *inter alia*, it was held that the defendant's conduct was not unconscionable for this purpose. The judge stated that the finding of undue influence 'is not by itself to be equated with a finding that [the stronger party] had acted with sufficient moral culpability to enable [the weaker party] also to invoke the alternative head of relief' based on unconscionability.[62] But how can the court condemn a defendant's conduct as amounting to undue influence and yet conclude that the same conduct is not unconscionable enough for purposes of relief on the ground of unconscionability?

Whilst a presumption of undue influence can be raised even in the absence of a specific act or conduct of the defendant that can be characterised as wrongful, nevertheless if the presumption is not rebutted the court intervenes 'on the basis that a civil wrong has been proved.'[63] The courts have confirmed on numerous occasions that undue influence, including presumed undue influence, is 'the victimization of one party by the other',[64] and a finding of undue influence is a finding that the defendant's conduct amounts to 'a civil wrong',[65] and specifically a finding that 'the ascendant party has unfairly exploited the influence he [has]

[60] See eg *Dunbar Bank Plc v Nadeem* [1998] 3 All ER 876 at 883; *Daniel v Drew* [2005] EWCA Civ 507 at [49].
[61] [2004] EWHC 2201 (Ch) at [106].
[62] See also *Evans v Lloyd* [2013] EWHC 1725 (Ch) at [76].
[63] *Nel v Neal* [2003] EWHC 190 (QB) at 86.
[64] *National Westminster Bank v Morgan* [1985] AC 686 at 706.
[65] *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 at [14]; [2001] UKHL 44 at [14].

over the vulnerable party.'[66] Since a finding of undue influence (whether actual or presumed) is a finding that the stronger party has abused his position of power, it is difficult to see how a finding of undue influence will not be sufficient to satisfy the requirement of unconscionable conduct on the part of the defendant, for purposes of relief on the ground of unconscionability. In such a case, the finding of undue influence only satisfies one of the unconscionability criteria. The alternative claim based on uncosncionability will succeed only if the other unconscionability criteria are satisfied.

Transactional Imbalance: must it be overreaching and oppressive?

Even if a claimant was under a special disability and the defendant's conduct was unconscionable, relief will not be available under the *Alec Lobb* test unless the third element of transactional imbalance is also satisfied. In the older cases, it was sufficient that the transaction was, from the weaker party's perspective, 'an improvident contract'.[67] Even under the more modern *Cresswell* formulation, the requirement is satisfied where the transactional imbalance was 'considerable'. However, under the *Alec Lobb* test, it is no longer enough that the transaction was hard or improvident; it must be 'overreaching and oppressive'.[68] The question is whether the transaction 'shocks the conscience of the court'.[69] It is not clear whether this shift in the threshold was deliberate and the policy rationale for it was not stated in *Alec Lobb*. However, the practical consequence is that in the modern cases this requirement has not been satisfied (and so relief has been refused) where the transaction, although hard, [70] or improvident [71] or even 'exceptionally improvident', [72] was not overreaching and oppressive or did not shock the conscience of the court.

[66] *National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC 51 at [34] and [30].
[67] Eg *Baker v Monk* (1864) 4 De GJ & S 388 at 394; 46 ER 968 at 971.
[68] [1983] 1 WLR 87, 95; *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at 152.
[69] [1983] 1 WLR 87, 95; *Godden v Godden* [2015] EWHC 2633 (Ch) at [94].
[70] Eg *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at 112; *Singla v Bashir* [2002] EWHC 883 (Ch) at [28].
[71] *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221.

This modern requirement has been described as 'a stringent one.'[73] Indeed, it is so stringent that the threshold for establishing it is higher than that for the transactional imbalance required to raise the presumption of undue influence. One requirement for the presumption is that the impugned transaction must be one that 'calls for explanation'. Since this is a pre-condition for the court to presume that the defendant has committed a civil wrong, one would expect the law to require a high threshold. And a transaction is one that calls for explanation if the transactional imbalance is not readily explicable by the motives on which ordinary people act.[74] Now, in *Humphreys v Humphreys*[75] a transaction described by the judge as 'a very one-sided one' satisfied the requirement for the presumption of undue influence. However, the judge doubted that the degree of transactional imbalance was sufficient to satisfy the requirement for unconscionability. Thus although the judge recognised the significance of his finding that the transaction was very one-sided, nevertheless he regarded 'it as questionable whether it was sufficiently disadvantageous for the invocation of this head of equitable relief.'[76] It is recognised that the threshold for unconscionability and undue influence need not be identical, since in the case of the former transactional imbalance is a criterion for relief whereas in the case of the latter it is a requirement for an evidential presumption. However, it is difficult to understand why a transaction that is so 'very one-sided' that it calls for explanation should not satisfy the requirement of transaction imbalance for relief on the ground of unconscionability.

Statutory Protection and Unconscionability

The discussion in the previous section has sought to show that the *Alec Lobb* test has curtailed the protective reach of unconscionability to such an extent that, in its current

[72] Eg *Kalsep Ltd v X-Flow BV* (2001), 9 March, Ch D, Pumfrey J.
[73] *Godden v Godden* [2015] EWHC 2633 (Ch) at [94].
[74] *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 at [21]; [2001] UKHL 44 at [21].
[75] [2004] EWHC 2201 (Ch).
[76] At [106].

incarnation, it is unable to provide effective protection to those contracting under circumstances of special disadvantage. Yet a call for a more liberal application of unconscionability is likely to be resisted on the ground that any protection deficit arising from the *Alec Lobb* effect has now been covered by adequate protection under various statutory regimes.[77] It may be said that the protection now afforded weaker parties under primary and secondary legislation has rendered unconscionability largely redundant in the modern law of contract and that there is no need to develop it. However, whilst it is acknowledged that statutory regulation of unfairness in contracts has reduced the need for reliance on unconscionability in certain areas, it is questionable whether this has turned unconscionability into a moribund doctrine that is unworthy of further development.

It is well known that statutory regulation has expanded in recent years and that much of it is designed to protect consumers.[78] And it is clear that the availability of a range of different remedies under various statutory regimes has impacted on the role of unconsionability in the protection of weaker parties. For example, as some statutory regimes now give consumers a cooling off period within which they can cancel or withdraw from certain consumer contracts,[79] a consumer who exercises this statutory right will have no need to resort to unconscionability for relief. The same is true of protection available under statutes that give the courts wide powers to reopen certain agreements found to be unfair and to make appropriate orders to remedy the unfairness.[80] Thus prior to the courts being given wide powers under the Matrimonial Causes Act 1973 (UK)[81] in relation to financial and property settlements between divorcing spouses, it was necessary for the court to rely on

[77] Eg *National Westminster Bank Plc v Morgan* [1985] AC 686 at 708.
[78] See eg *Chitty on Contracts,* above, n 33, vol 2, Ch 38.
[79] Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013/3134 (UK).
[80] Eg ss 140A and 140B of the Consumer Credit Act 1974 (UK).
[81] Ss 23-24B, 24E and 25A. See also sch 5 to the Civil Partnership Act 2004 (UK).

unconscionability in order to protect weaker parties against unfairness in such agreements.[82] However, since the entry into force of the statutory regime, unconscionability has become redundant in this area, as the courts now use their statutory powers to provide effective remedies to weaker parties.[83]

In cases where the statutory regime does not provide for the whole agreement to be reopened, statutory remedies can be more flexible and easier to access than relief on the ground of unconscionability. This is the case where a statute protects the weaker party by imposing a term or statutory obligation into a contract. Thus in Part 1 of the Consumer Rights Act 2015 (UK) (CRA)[84] statutory terms are included into a contract between a trader[85] and a consumer[86] for the sale of goods,[87] the supply of digital content[88] or the supply of services[89] and the trader cannot exclude or restrict his liability for breach of these terms.[90]

And, whereas under English law unconscionability operates by setting aside the whole contract, a statute can strike down only a specific term in a contract that is otherwise enforceable. Under Part 2 of the CRA, for example, a term (in a consumer contract) which is unfair[91] is not binding on the consumer.[92]

Even in cases where the statutory remedy is similar to rescission on the ground of unconscionability, it may be easier to obtain the statutory remedy. The Consumer Protection from Unfair Trading Regulations 2008 (UK)[93] prohibits traders from engaging in unfair

[82] Notably *Cresswell v Potter*, decided in 1968, but reported ten years later in [1978] 1 WLR 255.
[83] Eg *Backhouse v Backhouse* [1978] 1 WLR 243; *Butlin-Sanders v Butlin* [1985] Fam Law 126.
[84] Which implements the Sale of Consumer Goods and Associated Guarantees Directive, 1999/44/EEC (EU) formerly implemented in the Sale and Supply of Goods and Services Regulations 2002 (SI 2002 No 045) (UK).
[85] Defined in s 2(2) as a person acting for purposes relating to his trade, business, craft, or profession.
[86] Defined in s 2(3) as an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.
[87] Ss 9 to 13.
[88] See ss 34 to 37.
[89] Ss 49-52.
[90] See ss 31, 47 and 57.
[91] As defined in s 62(4).
[92] S 62(1). See also s 65(1).
[93] SI 2008 No 1277.

commercial practices,[94] which includes misleading action,[95] misleading omission,[96] aggressive practice[97] and those practices listed in schedule 1 of the Regulations.[98] The Regulations[99] now give the consumer three new private remedies against a trader[100] to 'unwind' the contract, claim a discount or claim damages.[101] The right to unwind a contract is similar to the remedy of rescission for unconscionability.[102] However, to unwind a contract, it is not necessary to show that the claimant was under a special disability or that there was a significant imbalance in the resulting transaction to the disadvantage of the weaker party. The claimant only needs to show that he was a consumer,[103] that the trader engaged in a commercial practice that is a misleading action[104] or aggressive practice[105] and that the prohibited commercial practice was a significant factor in the claimant's decision to enter into the contract.

Moreover, under statutory regulation, in addition to private rights of action, consumers can benefit from enforcement by a regulator. Thus, the CRA confers investigatory and other enforcement powers on the Competition and Markets Authority (CMA) and other regulators[106] in relation to enforcement of Part 2.[107] These include the power to consider a complaint about a relevant term in a trader's contract[108] and the power to apply to a court for an injunction[109] against a person if the regulator thinks that the person is using or proposing

[94] Reg 3(1).
[95] As defined in reg 5.
[96] As defined in reg 6.
[97] As defined in reg 7.
[98] Reg 3(4)(d).
[99] As amendment by the Consumer Protection (Amendment) Regulations 2014 (UK).
[100] In relation to contracts concluded from 1 October 2014.
[101] Reg 27E-J.
[102] Regs 27F(1) and 27G(5).
[103] Defined in reg 2(1).
[104] Under reg 5.
[105] Under reg 7.
[106] Listed in paragraph 8(1) of sch 3.
[107] See s 70 and schedules 3 and 5.
[108] Para 2 of sch 3.
[109] See eg *Office of Fair Trading v Foxtons Ltd* [2010] 1 WLR 663; [2009] EWCA Civ 288 (injunction granted).

to use a term that is unfair.[110] Similarly, under the 2008 Regulations, it is an offence for a trader to engage in misleading action,[111] misleading omission or aggressive practice[112] and the criminal remedies are enforced by designated enforcement authorities[113] for the benefit of consumers.[114]

However, although statutory regulation has provided weaker parties with a substantial degree of protection from exploitation and, as a result, they do not need to rely on unconscionability in the areas within the scope of the relevant legislation, unconscionability still serves an important role in the law's response to unfairness in contracts, alongside statutory regulation and the other common law and equitable doctrines, such as misrepresentation, mistake, duress and undue influence. Indeed, it is arguable that the current English version of unconscionability needs to be developed to enable it to provide adequate protection to persons contracting under circumstances of special disability in a variety of transactions. First, statutory regulation usually deals with very specific issues and leaves weaker parties without protection in areas outside the scope of the legislation in question. For example, the private rights of redress under the 2008 Regulations do not extend to contracts for the sale of immoveable property.[115] Consequently, a complainant such as the vendor in *Ruddick v Ormston*, discussed above, remains unprotected by the Regulations. Such a complainant would therefore benefit from protection through a more liberal application of unconscionability.

Secondly, even in cases where the weaker party can in principle exercise the relevant statutory right, there may be express limitations to the exercise of the remedy. For example, the statutory cooling off period within which a consumer may withdraw from specified

[110] See sch 3, paras 3 and 4.
[111] Otherwise than by reason of the practice satisfying the condition in reg 5(3)(b)
[112] Regs 9 to 11.
[113] Reg 2 and Part 4.
[114] Eg *R v Jackson* [2017] EWCA Crim 78.
[115] Reg 27C.

transactions is rightly very short[116] and the right to unwind a business to consumer contract under the 2008 Regulations is also short-lived and expires after 90 days.[117] A consumer who fails to exercise the statutory right within the time limit may need to rely on unconscionability for relief.[118]

Thirdly, in certain cases, statutory protection of consumers may not extend as far as a more expansive doctrine of unconscionability. For example, the Unfair Terms in Consumer Contracts Regulations 1999 (UK) (UTCCR), now Part 2 of the CRA, was intended to protect the consumer against unfair contract terms. However, in so far as a term in a consumer contract was in plain and intelligible language the term could not be assessed for unfairness in relation to the definition of the main subject matter of the contract or the adequacy of the price or remuneration as against the goods or services supplied in exchange.[119] As a result, where terms in banking contracts allowed banks to levy huge charges on personal current account customers in respect of unauthorised overdrafts, the UK Supreme Court held that, as the terms were in plain and intelligible language, no assessment of the terms for unfairness under UTCCR could relate to the adequacy of the charges levied as against the services supplied.[120] That decision was controversial because it was seen by some as failing to give consumers the protection they needed. UTCCR has been repealed and the wording in Pt 2 of the CRA, which replaces UTCCR, is slightly different.[121] But the case would probably be decided in the same way under the CRA, if the terms were found to be 'transparent and

[116] Fourteen days.
[117] Reg 27E(1)(3) and (4).
[118] Although a defence of laches is available, the time period is not limited to 90 days.
[119] Reg 6(2).
[120] *The Office of Fair Trading v Abbey National Bank Plc* [2010] 1 AC 696; [2009] UKSC 6.
[121] Section 64(2) excludes a term from an assessment for unfairness only where the term is 'transparent and prominent'.

prominent'. [122] However, the doctrine of unconscionability, which allows adequacy of consideration to be taken into account, can be used to challenge such charges.[123]

Fourthly, statutory regulation is mostly focused on the protection of consumers, leaving other weaker parties, including those who fall just outside the statutory definition of a consumer, to seek protection elsewhere. Thus, the protection provided by the CRA does not extend to an individual who, solely for purposes of his trade, business or profession, enters into a contract with a large company. Yet it is not uncommon for such individuals to find themselves in circumstances in which they need protection in their dealings with by large companies.[124] In such cases, unconscionability can provide the necessary protection,[125] as is the case in some jurisdictions.[126]

Even in the context of transactions between business entities, it is possible for a very large corporation to take unfair advantage of the circumstances of a small business. In such cases too, unconscionability can provide protection to the small business, as it has done in other jurisdictions such as Canada[127] and the USA.[128]

Furthermore, there is an international trend in favour of unconscionability or equivalent doctrine, beyond common law jurisdictions where the doctrine already exists. Thus in some civil law countries, where the doctrine or similar did not exist, unconscionability-type grounds of relief are now being adopted. [129] For example, until very recently, an

[122] As defined in s 64(3) and (4).
[123] Eg the attempt in Florida, USA, in *In re Checking Account Overdraft Litigation*, 694 F Supp 2d 1302 (S D Fla 2010). Of course such a claim will only succeed if all the unconscionability criteria are satisfied. In the Australian case of *Paciocco v ANZ Banking Group Ltd* [2016] 258 CLR 525; [2016] HCA 28, a statutory unconscionability claim in relation to bank charges for late payment of credit card balances failed because the claimant did not satisfy the statutory conditions for relief.
[124] See eg *Greenwood Forest Products (UK) Ltd v Roberts,* QB 12 March 2010.
[125] *Cf LSREF III Achill Investments Ltd v Corbett* [2015] IEHC 652 at [36]-[37].
[126] See eg in Canada, *Ohlson v CIBC* (1997) A R 140 and in the USA, *Shell Oil Co. v Marinello*, 307 A.2d 598 (N J Supp Ct 1973); *Johnson v Mobil Oil Corp*., 415 F Supp 264 (Mich 1976).
[127] Eg *Atlas Supply of Canada v Yarmouth Equipment Ltd* [1991] 103 NSR (2d) 1; *Plas-Tex Canada Ltd v Dow Chemical (Canada) Ltd* [2004] 245 DLR (4th) 650; 2004 ABCA 309.
[128] Eg *Spectrum Networks Inc v Plus Realty Inc,* 878 N E 2d 1122 (Ohio Com Pl 2007). See also, *DJ Coleman Inc v Nufarm Americas Inc,* 693 F Supp 2d 1055 (D N Dak 2010).
[129] Eg art 1118 of the Luxembourg Civil Code (inserted by enactment of 15 May 1987).

unconscionability-type ground of relief was not available under the French Civil Code.[130] As a result the French courts had to manipulate and strain other doctrines (such as mistake, fraud, duress) in order to provide weaker parties with effective protection against exploitation.[131] However, following a recent reform of the contract law provisions of the Civil Code, the new Civil Code (2016)[132] makes provision for the courts to intervene on a ground similar to unconscionability. Thus, in addition to relief on the traditional ground of duress under arts 1140-1142, relief is now available under art 1143, also for duress, 'where one contracting party exploits the other's state of dependence and obtains an undertaking to which the latter would not have agreed in the absence of such constraint, and gains from it a manifestly excessive advantage.'[133] Although this new ground of relief is described in art 1143 as duress, in terms of the elements required for relief, it is more closely related to the English doctrine of unconscionability.

The growing adoption of unconscionability-type ground of relief extends to international soft law instruments and proposals, including art 3.2.7 of the UNIDROIT Principles of International Commercial Contracts (2016) (UNIDROIT Principles), art 4:109 of the Principles of European Contract Law (1995) (PECL) and art III-7:207 of the Draft Common Frame of Reference (DCFR). At a time when internationally there appears to be a rising tide in favour of unconscionability or equivalent, it would be strange for English law to allow this ground of relief to become obsolescent.

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[130] Relief on the ground of *laesio enormis* or lesion (art 1118) was very restricted and applied only to certain contracts (eg contracts for the sale of immovable property (art 1674) or to protect certain persons, such as minors (arts 1305 et seq).

[131] eg *Deparis c Assurance Mutuelles de France*, Civ 30 May 2000, *D* 2000. 879, note J-P Chazal and 2001. 1140, obs D Mazeaud; *Larousse-Bordas c Kannas,* Civ 3 April 2002, *D* 2002. 1860, note J-P Gridel, 1862, note J-P Chazal, and 2844, obs D Mazeaud; *Sté Abri c Sté Boursorama*, Com 16 October 2007, no 05-19069.

[132] Promulgated by Ordinance No 2016-131 of 10 February 2016, on the reform of the law of contract, the general regime of obligations and proof of obligations.

[133] Translation from French by J Cartwright, B Fauvarque-Cosson and S Whittaker, available at www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.PDF, accessed on 7 December 2017.

How should the English Doctrine be developed?

If, as suggested above, notwithstanding the extent of statutory regulation, there is still an important role for unconscionability in the modern law of contract, but the *Alec Lobb* approach has eroded its protective power, how should the doctrine be developed to enable it to discharge its office more effectively and without undermining the general enforceability of contracts? In considering the shape that the future development of the doctrine may take, this section first examines existing suggestions in favour of merging unconscionability with other related doctrines before advancing another option for developing the modern English doctrine.

Merger with other Doctrines?

Some commentators have suggested that unconscionability should be merged with one or more of the other vitiating factors (including duress, undue influence, and mistake) to form one wider doctrine of unconscionability.[134] These suggestions have a certain attraction, as unconscionability shares some features with the other vitiating factors. However, the concern is that a merged doctrine would be too vague. What, for example, would be the elements required for relief on the ground of this wider doctrine? It is perhaps for this reason that Lord Denning's famous attempt to introduce a similar general principle of 'inequality of

[134] There are variants of this approach. Some advocate a merger with undue influence (Capper, above., n 9; Devenney and Chandler, above, n 20), others would like economic duress to be absorbed as well (A Phang, 'Undue Influence Methodology, Sources and Linkages' [1995] *JBL* 552), and some prefer the merged doctrine also to include mistake (J Phillips, 'Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine' (2010) 45 *Wake Forest L Rev* 837 at pp 849 and following.).

bargaining power',[135] in *Lloyd's Bank Ltd v Bundy,*[136] did not prosper in England[137] and other common law jurisdictions, with the exception of Canada.[138]

Another suggestion is for an even wider doctrine of unconscionability which would embrace not only the vitiating factors, but also a wide range of instances when the court intervenes because of underlying concerns about unfairness in the transaction, including, for example, the rules relating to the incorporation and interpretation of exemption clauses in contracts and the rules on forfeiture and penalty clauses.[139] It is interesting to note that some aspects of this idea have been embraced in Canada where the courts use unconscionability to strike down unfair exemption clauses[140] and in determining the enforceability of forfeiture and penalty clauses.[141]

However, it is submitted that the English courts should hesitate long before going down a similar path. Apart from the objection that such a wide doctrine of unconscionability would be too vague and elusive, there would be practical difficulties, for example, in absorbing the English forfeiture and penalty rules into a wider doctrine of unconscionability, as there are important differences between them. First, whereas in the case of relief against a penalty or forfeiture the court only refuses to give full force to the impugned contractual provision and the contract as a whole may be kept alive,[142] in the case of unconscionability the whole

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[135] Embracing five separate categories of case where relief is available: (a) duress of goods, (b) unconscionable transaction, (c) undue influence, (d) undue pressure, and (e) salvage agreements.
[136] [1975] QB 326, 339.
[137] The doctrine was not endorsed by the other members of the Court of Appeal in the *Bundy* case itself and it was later rejected by the House of Lords in *National Westminster Bank Plc v Morgan* [1985] AC 686 at 707-708.
[138] Eg *McKenzie v Bank of Montreal* (1976) 70 DLR (3d) 113; *Norberg v Wynrib* [1992] 2 SCR 226 at [31].
[139] S M Waddams, 'Unconscionability in Contracts' (1976) 39 *MLR* 369.
[140] *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* [2010] 1 SCR 69 at [122]-[123]; 2010 SCC 4 at [122]-123]; *ABB Inc v Domtar Inc* [2007] 3 SCR 461 at [82]; 2007 SCC 50 at [82]; *Plas-Tex Canada Ltd v Dow Chemical of Canada Ltd* (2004) 245 DLR (4th) 650; 2004 ABCA 309.
[141] Eg *Peachtree II Associates – Dallas LP v 857486 Ontario Ltd* (2005) 76 OR (3d) 362 at [32]; [2005 OJ No 2749 at [32]; *Birch v Union of Taxation Employees Local 70030* (2008) 93 OR (3d) 1; 2008 ONCA 809.
[142] Thus in the case of a forfeiture clause, in the ordinary course the court will only grant relief on the basis that the breach is rectified by performance, albeit late: *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2016] AC 923; [2013] UKPC 20. Of course in the case of a penalty clause the contract will be terminated where the breach is a repudiatory breach which is accepted by the innocent party.

contract is voidable and, under English law, the normal remedy is rescission,[143] subject to conditions where necessary. The position is different in some jurisdictions where the courts can strike down an objectionable clause or limit its application and enforce the remainder of the contract.[144]

Secondly, when applying the doctrine of unconscionability the court is concerned with the defendant's conduct at the time of conclusion of the contract, but when applying the forfeiture rule the court is concerned with the circumstances after formation of the contract. In the case of relief against forfeiture the question is whether, in the light of the circumstances after conclusion of the contract,[145] it is unconscionable for the party seeking enforcement to insist on the strict terms of the contract.

Thirdly, for the court to intervene on the ground of unconscionability it is an essential requirement that the stronger party took unfair advantage of the circumstances of the weaker party, but that is not the case with the rule against penalties, which is rather a rule for controlling remedies for breach of contract.[146] The penalty rule is concerned with the question whether the impugned clause served or protected a legitimate commercial interest and, if so, whether in the circumstances the obligations imposed by the clause (such as the amount payable) were exorbitant, extravagant or unconscionable.[147] In other words, the penalty rule, unlike the unconscionability doctrine, does not depend for its operation on a finding that one

[143] In some cases, where the stronger party seeks to enforce the contract by requesting an order for specific performance, the remedy will be a refusal to grant specific performance.
[144] eg, in the USA, under statutes based on section 2-302 of the Uniform Commercial Code and see also, American Law Institute, *Restatement (Second) of Contracts*, s. 208, in Australia see *Vadasz v Pioneer Concrete (SA) Pty Ltd* [1995] HCA 14; (1995) 184 CLR 102 and in Canada see the cases in notes 140 and 141 above.
[145] *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 (hereafter '*Makdessi*') at [227] and [294]; [2015] UKSC 67 at [227] and [294]; *Stockloser v Johnson* [1954] 1 QB 476 at 492;
[146] *Makdessi* [2016] AC 1172 at [42]; [2015] UKSC 67 at [42].
[147] *Makdessi* [2016] AC 1172 at [152]; [2015] UKSC 67 at [152].

party took unfair advantage of the other,[148] even though the court may consider the circumstances in which the contract was made.[149]

Moreover, if, as suggested in this paper, the problem with the modern English doctrine of unconscionability is that weaker parties now face almost insurmountable hurdles to obtain relief, then it is not clear what, if anything, is to be gained by simply gathering existing grounds of relief under an umbrella doctrine, if nothing is done about the high thresholds of the current criteria for relief.

Re-visiting the Unconscionability Criteria

A possible approach to the development of the current English doctrine is to retain unconscionability as an independent ground of relief, distinct and separate from other grounds, but to re-consider the criteria. If, as suggested in this paper, the law has taken a wrong turn in the way in which the *Alec Lobb* criteria have been adopted and applied, then in order to put the law on the right track it would be necessary to re-visit the criteria. As part of that exercise, it is helpful to interrogate the fundamental purpose or function of the unconscionability jurisdiction, since the criteria are there to ensure that relief is available in accordance with the purpose of the jurisdiction. Whilst judges have not always stated the purpose of unconscionability in the same way over the years, it is generally accepted that the court intervenes on this ground to prevent one party from taking unfair or unconscientious advantage of another person who is contracting under circumstances of special disadvantage.[150] It is said that unconscionability seeks to protect against 'victimisation',[151] or

[148] *Imperial Tobacco Company (of Great Britain and Ireland) v Parslay* [1936] 2 All ER 515 at 523; *Makdessi* [2016] AC 1172 at [34]; [2015] UKSC 67 at [34];
[149] *Makdessi* [2016] AC 1172 at [35] and [152]; [2015] UKSC 67 at [35] and [152].
[150] Eg *Cory v Cory* (1747) 1 Ves Sen 19; 27 ER 864; *Hunter Engineering Co v Syncrude Canada Ltd* [1989] 1 SCR 426 at 516; *Kakavas v Crowne Melbourne Ltd* (2013) 250 CLR 392 (hereafter '*Kakavas*') at [6]; (2013) 298 ALR 35 at [6]; [2013] HCA 25 at [6].
[151] E.g. *Hart v O'Connor* [1985] AC 1000 at 1024; *Louth v Diprose* (1992) 175 CLR 621 at 628, 630, 638.

the 'exploitation' of the weaker party's vulnerability.[152] This raises two main questions. First, what category of persons does the jurisdiction seek to protect? Next, what constitutes the unconscientious taking of advantage in this context?

Concerning the first question, it has long been established that the doctrine seeks to protect persons who, owing to their condition or circumstances at the time of contracting, are 'unable to judge for [themselves]'.[153] This aspect of the purpose of unconscionability is now reflected in the first *Alec Lobb* criterion (special disability). As explained above, this requirement has been given a sufficiently expansive scope in the modern English authorities. There is, therefore, no need for the present approach to be modified.

In relation to the unfair or unconscientious taking of advantage, a distinction is usually drawn between 'procedural' and 'substantive' unfairness.[154] The former is concerned with the unfair manner in which the intention to enter into a transaction was made. It includes cases of consent affected by vitiating factors such as misrepresentation, duress, or undue influence. Substantive unfairness or transactional imbalance is concerned with unfairness in the terms of the contract itself. It is widely accepted that unconscionability is concerned with procedural unfairness, although, as discussed below, there are differences of opinion on what constitutes or should constitute procedural unfairness for purposes of unconscionability. But there is debate as to whether, in addition to procedural unfairness, unconscionability should be concerned with transactional imbalance. It is helpful to consider these two issues in turn.

Procedural unfairness: unconscionable conduct of the stronger party

Since the purpose of equity's intervention on the ground of unconscionability is to prevent the stronger party from taking unconscientious advantage of the special disability of the

[152] *Lawrence v Poorah* [2008] UKPC 21 at [20]; *Louth v Diprose* (1992) 175 CLR 621 at 626; *Kakavas* (2013) 250 CLR 392 at [161]; (2013) 298 ALR 35 at [161]; [2013] HCA 25 at [161].
[153] *Chesterfield v Janssen* (1751) 2 Ves Sen 125 at 156; 28 ER 82 at 100.
[154] Eg *Hart v O'Connor* [1985] 1 AC 1000 at 1017-18.

weaker party, it is widely accepted that for relief to be available on this ground the conduct of the stronger party must have been unconscionable. However, unconscionable conduct covers a wide variety of conduct (including conduct falling short of actual fraud or other legal wrong) which equity regards as morally culpable. The point at which the line is drawn on the spectrum of morally culpable conduct would restrict or extend the protective reach of unconscionability. It has been argued above that the modern English authorities have raised the threshold for unconscionable conduct to such a high level that it has become extremely difficult for claimants to establish this requirement in many cases. However, in other jurisdictions the threshold is not so high.

In Australia, for example, although in recent years the courts have appeared to be raising the bar in relation to this element,[155] the threshold is still lower than that under English law.[156] What the claimant needs to show is 'conduct on the part of the defendant, beyond the ordinary conduct of the [relevant] business, which makes it just to require the defendant to restore the plaintiff to his or her previous position.'[157] That the Australian courts take a more liberal approach to this than their English counterparts can be seen in the context of a transaction between a bank (as lender) and an individual mortgagor who is under a special disability. Where the bank was concerned to ensure that the loan was amply secured but failed to make relevant enquiries about the capacity of the mortgagor to repay the loan, in Australia such conduct has been held to be unconscionable,[158] but under the modern English approach it would appear that such conduct is not unconscionable.[159]

[155] See eg *Kakavas* (2013) 250 CLR 392; (2013) 298 ALR 35; [2013] HCA 25, discussed below.
[156] *Comp* eg the English case of *Evans v Lloyd* [2013] 2 P & CR DG21; [2013] EWHC 113 (Ch), discussed above, with the Australian case of *Aboody v Ryan*, 2012 NSWCA 395, esp at [68] and [69].
[157] *Kakavas* (2013) 250 CLR 392 at [20]; (2013) 298 ALR 35 at [20]; [2013] HCA 25 at [20].
[158] See eg *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413 at [57]-[59]; *Perpetual Trustee Company Ltd v Khoshaba* [2006] NSWCA 41; *Gray v Small* [2004] NSWSC 97.
[159] *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221.

Similarly, in New Zealand the requirement[160] can be satisfied in circumstances where it would fail under the modern English approach. In *Moffat v Moffat*,[161] for example, the court granted relief where there was no finding of fraud or oppression on the part of the stronger party. The weaker party acted hastily and foolishly in agreeing to the transaction. She was advised to obtain independent advice, but she declined (just like the claimants in *Evans v Llewellin*). A submission that the court could not intervene on the ground of unconscionability unless there was some over-reaching by the stronger party (a submission that is consistent with the modern English approach) was firmly rejected by the New Zealand Court of Appeal. Hardy Boys J. explained that the weaker party did not have to establish actual fraud 'or even active moral delinquency on [the part of the stronger party]; but rather that her disability was sufficiently evident to [the stronger party], or ought reasonably to have been so, to render it unfair for him to obtain or accept her assent to the transaction'.[162] This test is not confined to property settlement agreements between divorcing spouses; it applies to other transactions, such as sales of land.[163] The approach in New Zealand is therefore more closely allied to that of the older English cases than that of the modern ones (such as *Ruddick*).

The approach of the courts in Australia and New Zealand indicates that a possible response to the problem of the current high threshold under English law may be to revise it downwards. In this regard, a possible test for unconscionable conduct of the stronger party is whether, at the time of the transaction, *the stronger party knew of the special disability of the weaker party and either took active steps to overreach the weaker party or failed to take reasonable steps to satisfy herself that the effects of the special disability had been repaired before entering into the impugned transaction*. There are two main aspects to this

[160] *Gustav & Co Ltd v Macfield Ltd* [2008] 2 NZLR 735 at [6]; [2008] NZSC 47 at [6].
[161] [1984] 1 NZLR 600.
[162] At 606.
[163] See eg *Nichols v Jessup* [1986] 1 NZLR 226 at 234 and 235.

formulation. It may be helpful to deal with the state of knowledge of the stronger party before turning to how, with such knowledge, the stronger party conducted herself.

Concerning the state of knowledge of the stronger party, it is generally accepted that actual knowledge, which includes wilful blindness or wilful ignorance, is sufficient.[164] However, there is a lively debate as to whether constructive notice should also be sufficient. On this point, the position of English law seems unsettled.[165] But in Australia it has been decided, in *Kakavas,*[166] that constructive notice is not sufficient.[167] In that case, the High Court of Australia also stated that mere inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction is not sufficient; the stronger party must have had a predatory state of mind.[168] That decision has been subjected to some criticism.[169]

However, it is submitted that constructive notice should not be sufficient for this purpose. If, as discussed above, the fundamental purpose of unconscionability is to prevent the stronger party from taking unconscientious advantage of the special disability of the weaker party, then the jurisdiction can only be invoked where the conscience of the stronger party is affected. Where the stronger party does not have actual knowledge (including wilful ignorance), it is difficult to see how his or her conscience can be affected simply by fixing him or her with constructive notice. The doctrine of constructive notice is relevant to priority as between competing property interests.[170] In that context, a person who did not have actual knowledge (including wilful blindness) may be fixed with constructive notice where he failed

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[164] *Owen and Gutch v Homan* (1853) 4 HLC 997 at 1035; 10 ER 752 at 767.
[165] *Comp Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at 152-152 and *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221.
[166] (2013) 250 CLR 392; (2013) 298 ALR 35; [2013] HCA 25
[167] See also *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 410-411 [39].
[168] At [161].
[169] R Bigwood, 'Still Curbing Unconscionability: Kakavas in the High Court of Australia' (2013) 37 *Melb U L Rev* 463.
[170] *Re Montagu's Settlement Trusts* [1978] 1 Ch 264 at 272-3. See also *Arthur v The Attorney General of the Turks & Caicos Islands* [2012] UKPC 30 at [36].

to make inquiries or investigations which a reasonable person ought to have made, whether the failure was due to negligence or inadvertence. The courts have resisted attempts to apply constructive notice beyond cases concerned with priority as between competing property interests,[171] especially to cases where the question is whether the defendant had such knowledge as to make his conduct unconscionable.[172] The reason is that a person's conscience cannot be affected by a particular situation if he did not have actual knowledge of that situation. It is true that a person who did not have actual knowledge of the special disability of the weaker party because of a negligent failure to make inquiries which a reasonable person ought to have made may be said to be at fault, but such fault (negligence) does not transform his conduct into one that is unconscionable.

In the recent Canadian case of *Downer v Pitcher*[173] the Court of Appeal of Newfoundland and Labrador, refusing to follow *Kakavas*, held that constructive notice should be sufficient knowledge in this context. Green CJNL, with whose judgment Harrington and Hoegg JJA agreed, argued that, while the unconscionability jurisdiction has to be based on 'some degree of fault or responsibility' on the part of the stronger party, there is no reason why equity's fastening of the conscience of the defendant to justify relief cannot include 'other forms of fault' as well as actual knowledge of special disability.[174] With respect, the problem with this reasoning is that those 'other forms of fault', such as negligence or inadvertence, do not sufficiently affect a person's conscience for it to be right to castigate the person's conduct as unconscionable.

Regarding the behaviour of the stronger party, who has the requisite knowledge, there is little difficulty where he or she takes active steps to overreach the weaker party, for example,

[171] Eg *Manchester Trust v Furness* [1895] 2 QB 539 at 545.
[172] For example, in the context of liability for knowing receipt of trust property transferred in breach of trust: *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437; *Arthur v The Attorney General of the Turks & Caicos Islands* [2012] UKPC 30 at [36].
[173] 2017 NLCA 13.
[174] At [46].

by applying pressure through repeated requests or by dissuading the weaker party from seeking independent advice. But where the stronger party does not take such active steps, the modern English cases tend to regard passive acceptance as insufficient to satisfy the requirement. [175] However, under the proposed test, passive acceptance may constitute unconscionable conduct where the stronger party failed to take reasonable steps to satisfy himself that the effects of the special disability had been repaired before the transaction was concluded. In terms of the actual steps that the stronger party ought to take, these would depend on the circumstances of each case. But the mere fact that the stronger party did not take active steps to get the better of the weaker party would not make his conduct morally blameless. For example, in a case where the special disability was due to ignorance of a specific matter, which was known to the stronger party, the reasonable step may be to disclose the information to the weaker party before conclusion of the transaction. In other cases, the reasonable step may be for the stronger party proactively to insist that the weaker party should obtain independent advice before entering into the transaction.

It should be noted that the reasonable steps to be taken by the stronger party would not necessarily remove all the effects of the special disability in every case,[176] but they would increase the likelihood that those effects would be remedied before the proposed transaction is concluded. Further, taking the reasonable steps would mean that the conscience of the stronger party (which was affected by knowledge of the special disability) would no longer be affected and therefore his conduct, in entering into the transaction with the weaker party, would not be unconscionable.

The approach of the Court of Appeal in *Bank of Credit and Commerce International SA v Ali (No 1)*[177] is close to the suggested test. In that case, in the context of a general release of

[175] Exemplified in *Ruddick* and in *Evans v Lloyds*, discussed above.
[176] The stronger party cannot be expected to take steps that will actually remove the effects of the special disability by, for example, providing the weaker party with competent independent advice.
[177] [2000] ICR 1410.

claims, the court held by a majority[178] that where, at the time of the release, the beneficiary of the release (in that case, a bank) knew that the other party (an employee) had or might have a claim and knew also that the other party was ignorant of it, this was unconscionable conduct and equity could intervene to give relief on the ground of unconscionability. In the House of Lords the case was decided on a different ground so that it was not necessary to reach a decision on the unconscionable conduct point.[179] However, Lord Nicholls referred to such conduct as 'sharp practice' and agreed that the law would give a remedy in such a case, although he left open the precise route by which the law would provide the remedy.[180] Lord Hoffmann also agreed with the majority in the Court of Appeal that the beneficiary of a general release could not be allowed to take advantage of such sharp practice.[181] Although this case was concerned with the specific context of a general release of claims, the approach on the issue of the conduct of the stronger party is consistent with the test proposed in this paper, in that the stronger party (the bank) knew that the weaker party (the employee) was under a special disability (ignorance), but failed to provide him with the relevant information before he signed the release.

What would be the practical effect of the proposed test? It would extend the protective reach of unconscionability under English law, in that cases such as *Ruddick* and *Evans v Lloyds* would be decided differently on this point, since in each the stronger party was aware that the weaker party was under a special disability, but failed to advise him to seek independent advice[182] before entering into the agreement. Yet the proposed test would not jeopardise the enforceability of contracts, as the complainant would still have to establish that at the time of the transaction the stronger party was aware of the special disability of the

[178] Sir Richard Scott V-C and Chadwick L.J., Buxton L.J. reserving his opinion on the point.
[179] [2002] 1 AC 251; [2001] UKHL/8
[180] At [32]-[33].
[181] At [70]-[71].
[182] In *Ruddick* the stronger party also failed to provide the weaker party the promised free valuation.

weaker party. This is not an easy burden to discharge,[183] especially in cases where the weaker party was represented by a solicitor.[184]

Should the requirement of transactional imbalance be abandoned?

There is a growing debate as to whether the doctrine of unconscionability should be concerned with transactional imbalance at all. Some have argued[185] that the purpose of unconscionability should be to protect the weaker party from procedural unfairness alone and therefore transactional imbalance should be abandoned as a criterion for relief, although it would remain relevant for its evidential value in relation to procedural unfairness. This approach appears to have been adopted by the courts in Australia[186] and New Zealand.[187] More recently, the Newfoundland and Labrador Court of Appeal [188] expressly and emphatically rejected transactional imbalance as a requirement for relief. However, this element remains a prerequisite for relief under English law and part of the contention of this paper is that the modern English authorities, following *Alec Lobb*, have raised the threshold for this requirement to a level that is too high. Although this problem would simply fall away if the requirement of transactional imbalance were to be abolished, it is submitted that this would not be the right response to the problem.

Unconscionability should not be assimilated with the doctrines concerned with procedural unfairness alone, such as misrepresentation, duress, and undue influence, as the function of unconscionability is different. It seeks to prevent one party taking unconscientious advantage

[183] See eg *Liddle v Cree* [2011] EWHC 3294 (Ch); *Gustav & Co Ltd v Macfield Ltd* [2008] 2 NZLR 735; [2008] NZSC 47 and *Kakavas* (2013) 250 CLR 392; (2013) 298 ALR 35; [2013] HCA 25.
[184] Eg *Jones v Morgan* [2001] EWCA Civ 995.
[185] Eg R Bigwood, 'Antipodean Reflections on the Canadian Unconscionability Doctrine' (2005) 84 *Can Bar Rev* 171; S M Waddams, *The Law of Contracts*, Canada Law Books Inc, Toronto, 2010, p 399; M McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, Lexis Nexis, Markham, 2014, p 552.
[186] See *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 462, 474-475, 489; *Kakavas* (2013) 250 CLR 392 at [118]; (2013) 298 ALR 35 at [118]; [2013] HCA 25 at [118].
[187] See *Gustav & Co Ltd v Macfield Ltd* [2008] 2 NZLR 735 at [6]; [2008] NZSC 47 at [6]; *Hildred v Strong* [2008] 2 NZLR 629 at [50]; [2007] NZCA 475 at [50].
[188] *Downer v Pitcher*, 2017 NLCA 13.

of the special disability of the other party to procure or accept a transaction that is substantively unfair. Even in the early cases, relief was not available where the transaction was fair or reasonable.[189] Under English law, the position has not changed. An 'unconscionable bargain' is, as Lord Brightman explained in *Hart v O'Connor,*[190] 'a bargain of an improvident character' made by a person under a special disability acting without independent advice. The difference between the function of unconscionability, which is concerned with unfairness in the terms of the transaction, and that of the doctrines concerned with procedural unfairness alone is to some extent reflected in the difference in the available remedies. Thus, under English law, damages are not available for unconscionability[191] whereas they are available for misrepresentation, duress[192] and, in the form of equitable compensation, for breach of fiduciary duty and undue influence.[193] To discard substantive unfairness as a requirement for relief on the ground of unconscionability is to alter the founding purpose (and nature) of the doctrine. To do this, it may be necessary to reconsider what amounts to procedural unfairness in this context (that is to say, what amounts to unconscionable conduct of the stronger party), since the present test for procedural unfairness is constructed on the basis that there is a further check or criterion for relief to be available.

Further, cases where there is procedural unfairness, but it is not such as to attract relief under one of the doctrines concerned with procedural unfairness alone, and where the terms of the resulting transaction are fair, so that relief is not available on the ground of unconscionability, are very exceptional. It is arguable that to discard transactional imbalance

[189] Eg *Cory v Cory* (1747) 1 Ves Sen 19; 27 ER 864.
[190] [1985] 1 AC 1000, at 1024.
[191] Eg *Norwich Union Life Insurance Society v Qureshi* [1999] Lloyd's Rep. IR 263. *Contra,* in Canada equitable compensation may be available for unconscionability: *Rick v Brandsema* [2009] 1 SCR 295 at [66]-[67]; 2009 SCC 10 at [66]-[67].
[192] At least where the act constituting duress also amounts to a tort: *Kolmar Group AG v Traxpo Enterprises* [2010] 2 Lloyd's Rep 653; [2010] EWHC 113 (Comm).
[193] Where rescission is not available: *Mahoney v Purnell* [1996] 3 All ER 61; *Jennings v Cairns* [2003] EWCA Civ 1935 at 45.

completely as a requirement would be a disproportionate response to the alleged injustice in this small minority of cases.

A number of arguments have been advanced in favour of abandoning the requirement of transactional imbalance. However, whilst there is force in some of them, it is submitted that they are not compelling for the reasons discussed below. One argument advanced is that a purely procedural approach to unconscionability accords better with the fundamental principles underlying unjust enrichment [194] or would be consistent with the doctrines concerned with procedural unfairness.[195] However, if, as discussed above, the function of unconscionability is different from that of the doctrines concerned only with procedural unfairness, then the need for consistency with these doctrines does not arise.

Another argument against transactional imbalance is that in a liberal society laws that govern private transactions should focus on procedures, not results, and that the only transactions that should be set aside are those that infringe the rules concerned to ensure procedural fairness.[196] However, this idea is not universal.[197] And, even if it is accepted as a general rule, there can be, and there are, exceptions to it. Some introduced by the legislature;[198] others developed by the courts.[199] Unconscionability is, or may be regarded as, one of the latter.

A third objection against transactional imbalance is that the unfairness of a transaction is too difficult for judges to assess and that, under a liberal conception of contract, the terms are fair because the parties agreed under conditions of procedural fairness.[200] However, the courts are well accustomed to assessing unfairness of terms and they have been doing so for

[194] McInnes, n 185 above, p 552.
[195] Bigwood, n 185 above, p 213.
[196] McInnes, n 185 above, p 552.
[197] See eg the UNIDROIT Principles, which provide for relief on the ground of gross disparity. See also S Smith, 'In defence of Substantive Fairness' (1996) *LQR* 138.
[198] Too numerous to list, but see e.g. The Consumer Rights Act 2015 (UK), discussed above.
[199] Eg the rule against penalties.
[200] Bigwood, n 185 above, pp 208-9.

centuries. Indeed the legislature has given the courts powers to assess and remedy substantive unfairness in various situations,[201] thereby demonstrating the confidence of the legislature in the ability of the courts to assess unfairness in the terms of contracts.

It is also argued that to insist on transactional imbalance as a requirement for relief would result in injustice in cases where the court upholds a transaction because the terms are fair, even though the defendant took unfair advantage of the claimant's weakness in the making of the decision to enter into the contract.[202] But, as discussed above, such cases are very rare. Moreover, in such cases the weaker party rarely feels a sufficient sense of injustice to challenge the transaction, since "people tend not to contest substantively fair or reasonable contracts".[203] If substantive unfairness is what people are really concerned about, then, as a matter of legal policy, it is appropriate for judicial intervention on the ground of unconscionability to be limited to cases where the transaction is substantively unfair, as being more deserving of protection than those where the terms of the transaction are fair.

A further argument for abandoning transactional imbalance as a requirement was recently advanced by the Court of Appeal of Newfoundland and Labrador in *Downer v Pitcher*.[204] The court opined that jettisoning this requirement 'will bring the [unconscionability] doctrine into line with the early English cases which placed emphasis on vulnerability resulting from a disparity of bargaining positions and the taking advantage of that vulnerability.' To support this view the court cited a passage in the judgment of Lord Hardwicke in *Chesterfield v Janssen*[205] where, according to the court in *Downer*, he 'stressed the need to "prevent taking surreptitious advantage of the weakness or necessity of another."'

[201] See eg Part 2 of the Consumer Rights Act 2015 (UK) and ss. 140A and 140B of the Consumer Credit Act 1974 (UK).
[202] Bigwood, n 185 above, p 207.
[203] Bigwood, n 185 above, pp 207-8.
[204] 2017 NLCA 13 at [35].
[205] (1751) 2 Ves Sen 125.

However, in that passage Lord Hardwicke was merely explaining the purpose of raising a *presumption* of fraud, rather than the purpose of the unconscionability jurisdiction. The question in that case was whether if the contract was valid in law, it could be relieved against in equity on the ground that it was contrary to conscience. Lord Hardwicke opened his discussion of this issue by stating that the court had undoubted jurisdiction in equity to relieve against every species of fraud. He then went on to explain various kinds of fraud against which equity provided relief. It is his third 'kind of fraud' that is referred to by the court in *Downer*. Lord Hardwicke explained that this is fraud 'which may be presumed from the circumstances and condition of the parties contracting' and that this presumption 'is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another'. This passage, in which Lord Hardwicke was explaining the purpose of the presumption of fraud, is not an indication that relief on the ground of unconscionability was based on procedural unfairness alone. The second kind of fraud identified by Lord Hardwicke, but not mentioned by the court in *Downer*, concerns the case where the bargain itself was plainly unfair; 'such as no man in his senses and not under delusion would make on the one hand, and no honest and fair man would accept on the other.'[206] The emphasis here is clearly on the unfairness of the terms of the contract itself. Lord Hardwicke expressly stated that such transactions 'are unequitable and unconscientious bargains'.[207]

Even before the decision in *Chesterfield* the position of English law was that for an agreement to be set aside on the ground of unconscionability it must be substantively unfair.[208] In *Cory v Cory*,[209] for example, where a son entered into an agreement with his father and afterwards the son complained of paternal authority being exerted (procedural

[206] At 155.
[207] At 155.
[208] Indeed in the early cases transactional imbalance alone was a sufficient basis for intervention in transactions with expectant heirs: eg *Berney v Pitt* (1686) 2 Vern 14; 23 ER 620; *Peacock v Evans* (1809) 16 Ves Jun 512; 33 ER 1079.
[209] (1747) 1 Ves Sen 19; 27 ER 864

unfairness), the Lord Chancellor stated that 'though there might be something of that sort, yet if the agreement be reasonable, the court will not set it aside.' And since the agreement in that case was reasonable, it was not set aside. Therefore, to abandon substantive unfairness as a requirement for relief would be to depart from, rather than to align with, the early English cases.

Another point made by the court in *Downer* is that statements in some cases in the Supreme Court of Canada have emphasised procedural unfairness without reference to transactional imbalance.[210] However, there are many statements in the Supreme Court of Canada identifying transactional imbalance as a criterion for relief. For example, in *Norberg v Wynrib*[211] the judgment of La Forest, Gonthier and Cory JJ included 'proof of substantial unfairness of the bargain'[212] or 'terms which are very unfair'[213] as one of the requirements for relief. The judgment specifically stated that '[i]t must be noted that in the law of contract proof of an unconscionable transaction involves a two-step process: (1) proof of inequality in the positions of the parties, and (2) proof of an improvident bargain.'[214] Again in *Hodgkinson v Simms*[215] La Forest J stated that whilst undue influence focuses on sufficiency of consent, 'unconscionability looks at the reasonableness of a given transaction'. Similarly, in *Rick v Brandsema*[216] Abella J, with whom McLachlin CJ and Binnie, Deschamps, Fish, Charron and Rothstein JJ agreed, stated that for relief to be available on the ground of unconscionability the impugned agreement must be 'found to be procedurally and substantively flawed'.[217] Moreover, it is significant that there is no statement in the Supreme Court of Canada that transactional imbalance is not, or should not be, a requirement for relief.

[210] 2017, NLCA 13 at [36].
[211] [1992] 2 SCR 226.
[212] At [30].
[213] At [31].
[214] At [40].
[215] [1994] 3 SCR 377 p 406, [67].
[216] [2009] 1 SCR 295 at [42]; 2009, SCC 10 at [42].
[217] Following *Miglin v Miglin* [2003] 1 SCR 303; 2003, SCC 24.

It is perhaps worth noting that transactional imbalance is a requirement for relief in most common law jurisdictions.[218] This approach is gaining ground even in some civil law jurisdictions. For example, in the recent reform of the law of contract in France, transactional imbalance is one of the requirements for relief under the newly introduced unconscionability-type ground in art 1143 of the Civil Code, discussed above. Moreover, the trend in international soft law, including the UNIDROIT Principles,[219] is to include transactional imbalance as a pre-requisite for relief. English law should not lightly break away from the dominant position within common law jurisdictions and the wider international trend.

If transactional imbalance is to be retained as a requirement, how should English law be developed to address the *Alec Lobb* problem? It is submitted that a sufficient response would be to lower the current threshold for establishing transactional imbalance. One way of doing this is by replacing the *Alec Lobb* formulation, that the transaction must be 'not merely hard or improvident, but overreaching and oppressive', with one that requires *a considerable imbalance in the rights and obligations of the parties under the transaction to the disadvantage of the weaker party*. This formulation, which is along the lines of the *Cresswell* criterion, strikes a proper balance between the competing interests in this field. On the one hand, it increases the likelihood of the claimant obtaining relief since it would make it possible for this requirement to be satisfied in those cases, such as *Humphreys v Humphreys*,[220] where the transactional imbalance was considerable, but not enough to satisfy the *Alec Lobb* threshold. On the other hand, it would not threaten the general enforceability of contracts since the courts will continue to refuse relief in cases where there is no transactional imbalance or where it is insignificant.

[218] Australia, New Zealand and Newfoundland and Labrador are the only exceptions known to the author.
[219] Art 3.2.7.
[220] [2004] EWHC 2201 (Ch). See also *Godden v Godden* [2015] EWHC 2633 (Ch).

Conclusion

It is well known that equity mends no man's bargain.[221] However, to protect the weak from exploitation by the strong, it intervenes 'to avoid unconscionable bargains'.[222] This paper has endeavoured to show that, in the case of English law, the uncertainty and confusion, which once bedevilled the criteria for equity's intervention on this ground, has been replaced by certainty and predictability, resulting from the triumph of *Alec Lobb* over *Cresswell*. Nevertheless, it has been argued that the *Alec Lobb* approach has severely restricted the protective reach of unconscionability, thus leaving a deficit in the protection of weaker contracting parties. Whilst statutory regulation of unfairness in contracts has now reduced this protection deficit, especially in relation to consumers, it has not rendered unconscionability otiose, nor has it removed the need to develop unconscionability to enable it to meet contemporary challenges in the protection of those contracting under circumstances of special disadvantage.

However, the paper has argued that in developing the English doctrine of unconscionability, its concern with unfairness in the terms of the transaction should be maintained and that, unlike the approach in a few common law jurisdictions, substantive unfairness should not be abolished as a requirement for relief. It has also been argued that, contrary to the recent opinion of the Court of Appeal of Newfoundland and Labrador, the concept of constructive notice should not be used to extend the scope of the requirement of unconscionable conduct of the stronger party, by facilitating a finding that the stronger party had knowledge of the special disability of the weaker party.

Rather it has been suggested that the *Alec Lobb* problem should be resolved by modifying the current unconscionability criteria. Thus in addition to the requirement that (a) the complainant (the weaker party) was under a special disability, what the claimant would need

[221] *Maynard v Moseley* (1676) 3 Swans 651 at 655; 36 ER 1009 at 1011.
[222] *International Energy Group Ltd v Zurich Insurance Plc* [2016] AC 509 at [185]; [2015] UKSC 33 at [185].

to show, under the proposed test, is that (b) the other party had knowledge of the special disability of the weaker party and either took active steps to overreach the weaker party or failed to take reasonable steps to satisfy himself that the effects of the special disability had been remedied before the transaction was concluded and (c) there was considerable transactional imbalance in the resulting transaction to the disadvantage of the weaker party. It is hoped that developing the current English law along these lines would extend the protective reach of unconscionability and confirm that the doctrine is indeed 'in good heart and capable of adaptation to different transactions entered into in changing circumstances'.[223]

[223] *Credit Lyonnais Nederland Bank NV v Burch* [1997] 4 All ER 144 at 151.